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Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRADY COLE,
Counsel for Petitioners.

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BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

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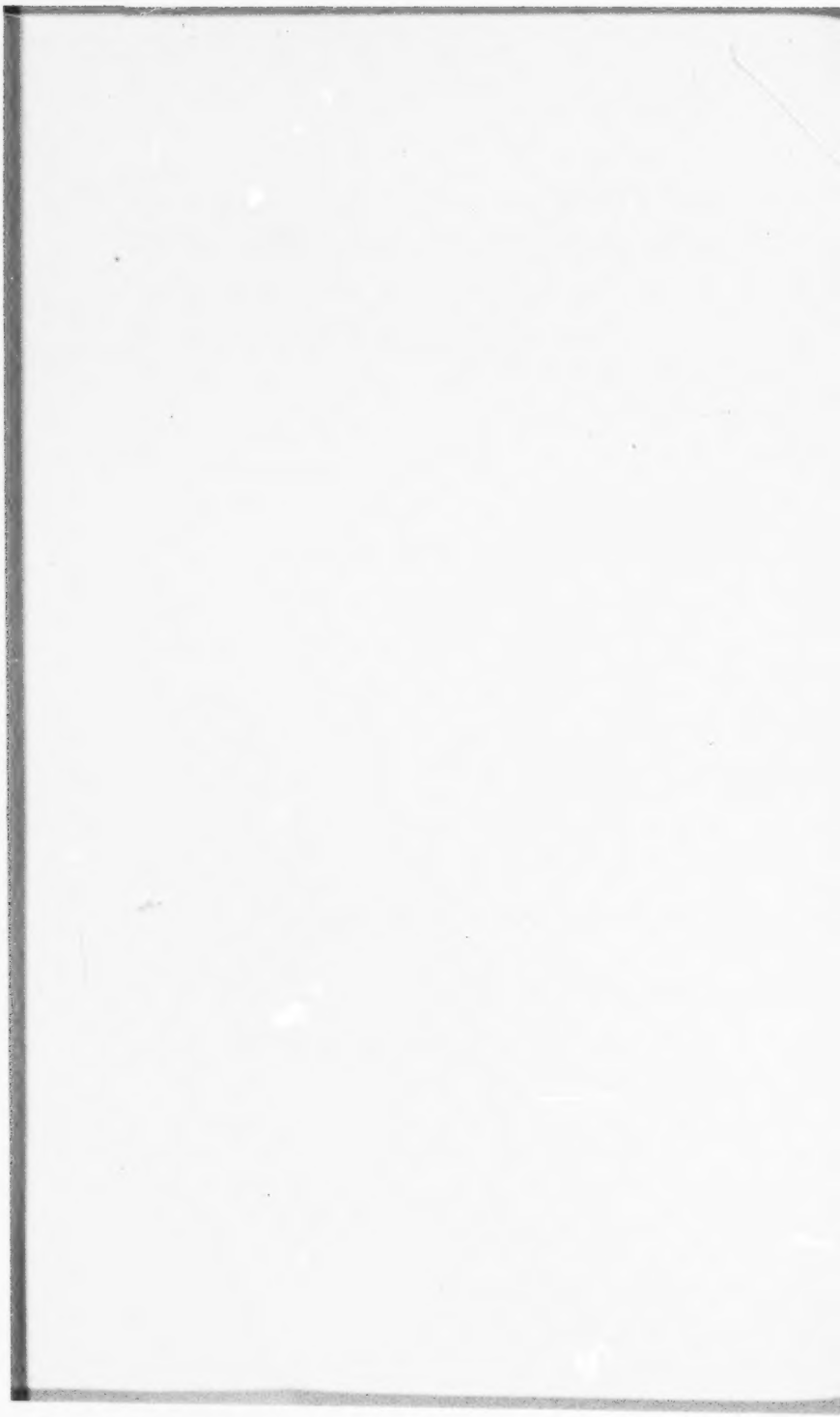

Supreme Court of the United States

OCTOBER TERM, 1943.

NO.

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioners, Edwin K. Atwood and Alice B. Atwood, individually and as Conservatrix of the Estate of Richard W. Atwood, distracted, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit affirming a decree in the District Court of the United States for the Southern District of Texas, respectfully submit:

This is an action to quiet the title to all the minerals in the vast King Ranch comprising 1,000,000 acres in more than thirteen counties in the State of Texas. As an incident to quieting such title, this action seeks to establish a trust of the minerals and to secure the appointment of a successor trustee, the prior trustee having died, and to cancel two mineral leases dated Sept. 28, 1933 leasing all of said minerals to Humble Oil & Refining Company.

Mrs. King's Mineral Trust and Will.

Mrs. Henrietta M. King, the widow of Captain Richard King, was the owner of all of his vast ranching properties and estates known as the King Ranch, including the minerals therein, following his death in 1885 (R. 2516). She died in 1925 at the great age of 92 years owning the "surface" title to approximately 1,000,000 acres valued for inheritance tax purposes (without reference to minerals) at over $5,000,000 (R. 1573), together with livestock worth over $1,000,000 and other personal property also worth over $1,000,000 (R. 1612, 1816). The fair market value of the King Ranch minerals for leasing purposes over a 20-year primary term (exclusive of the immensely valuable one-eighth royalty) was over $22,000,000 in 1933, and has increased greatly since that time (R. 1440-1).

On March 1, 1919 Mrs. King "severed" all of the minerals in said 1,000,000 acres from the "surface" title and conveyed the same to Robert J. Kleberg, Sr. (R. 89-101). The instrument, after giving him extensive powers as attorney-in-fact, including wide power to lease and sell the minerals, conveyed to him in fee simple 3/32nds undivided interest in the minerals "in consideration of his services to be rendered" thereunder, and then added the following language:

"* * * I, the said Henrietta M. King have Bargained, Sold, Assigned, Transferred and Set Over, and By These Presents do Bargain, Sell, Assign, Transfer and set over, IN TRUST HOWEVER, unto him, the said Robert J. Kleberg, the other, and remaining twenty-nine thirty-seconds (29/32nds) Parts, * * * (describing the minerals) which I now own * * * or to which I shall, at the time of my death, or my Estate shall, in any manner, and at any time own, or be entitled to possess, or receive, now, or hereafter, * * *.

"THIS DECLARATION OF TRUST, AND THE TRUST HEREBY CREATED, to continue to be, and exist, and continue in full force and effect, for the full term of FIFTY (50) YEARS, from this, the First (1st) day of March, A. D. 1919, for the Uses and Purposes, and for all such Uses and Purposes, and for the Benefit of all such person or persons, as I may hereafter, in writing, designate and declare, or by my Will provide for, otherwise this said twenty-nine thirty-seconds (29/32nds) of all such Oil, Gas, Sulphur, Coal, or other Minerals to be, and remain, my own Property, and for my own Sole Use and Benefit, and at my death, unless disposed of, be, and constitute a part, of my Estate." (R. 92.)

This mineral trust was formally recorded in six Texas counties where the minerals lay by Mrs. King in 1919, and in seven more Texas counties by her residuary (testamentary) trustees after her death in 1925 (R. 93-101, 802).

The Circuit Court of Appeals appears to have thought that this mineral trust might have been "an unfinished and incomplete instrument" (R. 3124); but the defendants themselves pleaded that the mineral trust was valid and effective from 1919 to Mrs. King's death in 1925 (R. 186-8,

195, 205, etc.) and admitted in their pleadings that nearly 200 mineral leases made by Kleberg *acting as mineral "Trustee for Mrs. Henrietta M. King"* between 1919 and 1925 "conveyed fee determinable estates in the minerals," which mineral leases were made "with the full knowledge and consent of Mrs. King" who "fully ratified everything" the mineral trustee did (R. 207, 443-4, 457-9, 529-30, 551, etc.). The defendants also admitted in their pleadings that on March 31, 1925, the date of Mrs. King's death, the entire King Ranch minerals were exclusively owned in fee simple determinable by the Humble Company under perpetual mineral leases made by Kleberg *acting as mineral trustee* in 1922-4 (and earlier) (R. 443, 2822-3036), which leases had been acquired and developed at a cost to the Humble Company of over $350,000 (R. 2382, 2839, 2911, 3085-97). These leases were a *second* "severance" of all the minerals from the King Ranch lands, the right of reverter under such leases being in Kleberg (*not* in Mrs. King).

The Circuit Court of Appeals also held, alternatively, that the mineral trust terminated on Mrs. King's death because she made no effective disposition of the mineral interest and designated no uses, purposes and beneficiaries thereunder in her will (R. 3125). Mrs. King's will, after specific bequests, devised *all the rest and residue of her estate, real, personal, and mixed,* to eight residuary trustees (Robert J. Kleberg, Sr. and seven others) for a period of ten years from the date of her death and until the final partition and distribution by them of all of her residuary estate (R. 62). She directed the trustees to pay small annuities monthly (less than 4% of the gross income of her estate) to her descendants (R. 71-2), and she granted her residuary trustees power *in general terms* (1) to hold and manage the trust estate, (2) to lease and sell it and

invest the proceeds, and (3) to borrow money and secure the same by liens thereon (R. 71, 81-3).

She granted the trustees no special powers (1) *to develop the minerals or conduct mining operations which would "waste" the estate; or* (2) *to lease or sell the minerals upon royalties, rentals or installments payable beyond the termination of the ten-year residuary trust.*

Upon expiration of the trust period the residuary trustees were mandatorily directed to partition and distribute the entire residuary trust estate to her children and grandchildren *per stirpes* as follows:

To her son, Richard King, and to her daughter, Alice Kleberg, or their descendants, if deceased, each, the whole, and to her granddaughter Henrietta Welton Page or, if deceased, to her descendants, and to her grandchildren, the children of Nettie King Atwood or, if deceased, to their descendants, each, one-half, of (a) certain specifically devised lands and property; (b) one equal one-fourth of all other personal or mixed property not otherwise devised or bequeathed which at the final partition of her estate remained in the hands of the trustees subject to partition; and (c) one equal one-fourth of *all other property, real, personal or mixed,* not otherwise specifically enumerated, devised, or bequeathed, then subject to partition (R. 74-81).

Captain and Mrs. King had four children, all of whom, except one, predeceased their mother. Mrs. King's descendants on the date of her death were (1) her daughter, Alice Kleberg; (2) the children of her son, Richard King; (3) Henrietta Welton Page, the child of Ella King Welton, her daughter; and (4) the children of Nettie King Atwood, her daughter (R. 835-6). Plaintiffs are three of the four

Atwood grandchildren; and defendants are all of the other beneficiaries and the residuary trustees.

The Circuit Court of Appeals held, as we have stated, that the mineral trust failed and terminated on Mrs. King's death because she made no effective disposition of the beneficial interest under the mineral trust and designated no purposes, uses and beneficiaries thereunder in her will (R. 3125-6).

Petitioners say that this holding is squarely in conflict with the estoppel by judgment in the Tule partition decree referred to below and with the local law of the State of Texas, which law the lower Federal Courts have failed and refused to follow. (See Brief below.)

The San Salvador del Tule Grant Partition Decree.

Robert J. Kleberg died in 1932 at the age of 78 (R. 1102). Between Mrs. King's death in 1925 and his death in 1932 Kleberg, *acting as mineral trustee*, conveyed as grantor and accepted as grantee the same minerals originally conveyed to him by the March 1, 1919 mineral trust in ten separate transactions (R. 2564-2801). Among these were two conveyances in 1927 and in February, 1930 from Humble Oil & Refining Company to Kleberg, *as mineral trustee*, and to his *successors* in trust, surrendering and re-conveying to them *in that capacity under the mineral trust* all of the minerals previously leased by him (with Mrs. King's consent and approval) to Humble Oil & Refining Company in 1922-4 (and earlier) prior to Mrs. King's death in 1925 (R. 2723, 2801).

Also between 1925 and 1930 Kleberg, *acting as mineral trustee*, participated in three lawsuits involving the min-

erals held by him in trust. The first was a quiet title proceeding to clear title to 5100 mineral acres of the King Ranch in which a valid decree *in rem* was entered on January 8, 1929 adjudging Kleberg, *as mineral trustee,* to be the owner of the minerals and the residuary trustees to be the owners of the "surface" (R. 2700). This decree, to which the Humble Company was a party, stands unimpaired to this day. In the second, Kleberg, *acting solely as mineral trustee,* brought suit to restrain certain condemnation proceedings which the residuary trustees had failed to block (R. 2725).

The third was a partition and quiet title proceeding under Texas law in which a final decree of partition of the famous San Salvador del Tule Grant of 500,000 acres was entered on July 21, 1930 decreeing *in rem* that Kleberg, *as mineral trustee,* was the owner of all of the minerals in 127,000 acres of the King Ranch and that the residuary trustees were the owners of the "surface" in the same 127,000 acres (R. 514-7, 2743). (Certified copy of original decree transmitted to this Court.) This decree was entered after 20 years of litigation and five months after all the King Ranch minerals had been finally reconveyed by Humble to Kleberg *as mineral trustee* and to his "successors" on February 24, 1930 (R. 2723, 2801). It is this last decree to which we make special reference here.

"Unknown Heirs" and "Unknown Owners" were made defendants to this proceeding by all the methods known by Texas statutes, and this partition decree forever partitioned and quieted the title to both minerals and surface *in full compliance with Texas law* (R. 2742, 2792). This Tule partition decree *in rem,* under the established law of Texas (see Brief below) is not only *res judicata* against

the world and therefore binding upon all persons, including all parties to this cause, interested in the 127,000 mineral acres therein and herein involved, but is *also* an estoppel by judgment against the contradictory holding of the Circuit Court of Appeals above referred to that the mineral trust had previously terminated in 1925.

The Circuit Court of Appeals held that the residuary trustees, who intervened as actual parties in the Tule partition suit and who represented therein the ultimate beneficiaries (R. 2753), could not act "in derogation of the terms" of Mrs. King's will and thereby bind the beneficiaries; and that since the ultimate beneficiaries were not *also actual parties* to the Tule partition decree "in the right in which they now appear in this Court" (as distinguished from Unknown Heirs and Unknown Owners), the Tule decree *in rem* could not be effective "as an estoppel or otherwise against them" (R. 3123). The Circuit Court did not in words deny that the ultimate beneficiaries were in privity with both the mineral trustee and the residuary trustees, nor deny that they were in any event included among "unknown heirs" and "unknown owners"; but this must be the effect of its decision.

Petitioners say that this holding is in violation of the "full faith and credit" clause of the Constitution and laws of the United States and with the statutes and decisions, and therefore the established law, of the State of Texas. (See Brief below.)

Kleberg's Deed of July 3, 1928.

On July 3, 1928 (three years *after* Mrs. King's death) Kleberg, *acting as mineral trustee,* purported to terminate and repudiate the mineral trust of March 1, 1919

by retaining the 3/32nds of the minerals conveyed to him thereunder "for my services to her under said instrument," and by conveying the remaining 29/32nds minerals to the residuary trustees, reciting that it was his "intention to merge the title" to the 29/32nds minerals "with the title to the respective lands, forever free" of the mineral trust (R. 102). The residuary trustees claimed in their pleadings that this deed in 1928 "merged" the minerals with the "surface" (R. 189, 196); but Humble pleaded that this deed appointed the residuary trustees *as successors in trust* to Kleberg *as mineral trustee* (R. 91, 210). There was not one word in this deed to the effect that the mineral trust had terminated on Mrs. King's death *three years* earlier; on the contrary, it was a present conveyance in 1928 (R. 102, 107).

The Circuit Court of Appeals correctly held that this deed was utterly "without effect, for if the trust was in fact and in law continued. Kleberg had no authority to bring it to an end." (R. 3123).

The recitals of this abortive deed were obviously another estoppel against the inconsistent contention that the mineral trust had already terminated three years earlier on Mrs. King's death.

The Humble 1933 Mineral Leases.

On Sept. 26, 1933 the residuary trustees, acting as though they were the sole owners of the minerals, executed two new leases to Humble Oil & Refining Company purporting to lease the entire King Ranch minerals for a minimum "primary" term of twenty years, and thereafter in perpetuity so long as minerals should be produced therefrom (R. 109,

136). These leases, therefore, extended a minimum of 18½ years beyond the termination of the ten-year residuary trust period which ended in March, 1935; and in the event minerals were developed, the leases were to continue on in perpetuity so long as minerals should be produced.

The effect of these leases was thus not only to "waste" the minerals but also to deprive the beneficiaries of their (unclouded) fee simple title to the minerals to which the beneficiaries were entitled upon termination of the 10-year testamentary trust on March 31, 1935, upon which date the minerals were mandatorially to be distributed under Mrs. King's will (R. 74-5).

No oil was ever produced or other minerals developed on the King Ranch at any time prior to Mrs. King's death in 1925 (R. 3096).

The Circuit Court of Appeals held that the residuary trustees, under the mere *general* power to lease or sell the trust estate (without any reference to minerals as such or to mineral leases), nevertheless had *special* power (1) to conduct mining operations which would "waste" the minerals, though none had been developed in Mrs. King's lifetime, and (2) to lease or sell the minerals upon royalties, rentals and installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in March, 1935 (R. 3116, 3186).

The Circuit Court of Appeals thus held that the Humble 1933 mineral leases were valid and within the powers of the residuary trustees even though (a) they were made by the residuary trustees (and not by the mineral trustee) as lessor, and (b) even though they constituted "waste" of the mineral estate, and (c) even though they clouded the

title to all the minerals and deprived plaintiffs of their share thereof for 18½ years and possibly in perpetuity after the trust finally terminated in 1935.

Petitioners say that these holdings are squarely in conflict with the law of the State of Texas as laid down by its Supreme Court, which law the Federal Courts are required to apply by the decisions of this Court. (See Brief below.)

It is to review the action of the Circuit Court of Appeals as above set forth that this Petition for Writ of Certiorari is filed in this Court.

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case, that the Tule partition decree *in rem* is not binding as *res judicata* and as an estoppel by judgment upon the beneficiaries under the mineral trust or under Mrs. King's will, fails to give such decree "full faith and credit" and therefore *directly conflicts upon a question of Federal law* with the provisions of Section 1, Article 4 of the Constitution of the United States, with the provisions of Section 905 of the Revised Statutes (28 U.S. C.A. 687), with all of the decisions of this Court, and with the applicable statutes and laws of the State of Texas.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case also directly conflicts with the decisions of this Court which require all Federal Courts to follow the local law of the state in which the controversy or transaction arose or in a proceeding *in rem*, in which the real property in question lies. Since the real property in this case, as well as Mrs. King's mineral trust

and will and their respective trustees, are all clearly subject to the law of the State of Texas, and since, as we show below in our Brief in support of this Petition, the decision of the Circuit Court of Appeals for the Fifth Circuit is squarely in conflict with the established law of the State of Texas applicable to the powers of trustees to commit "waste" and to make leases extending long beyond the trust term, it follows that this Court has jurisdiction to alter or amend the decision of the Circuit Court of Appeals to conform with the law of the State of Texas.

The Questions Presented.

There are four questions presented, all of which petitioners answer in the negative:

1. Did the Circuit Court of Appeals give "full faith and credit" to the San Salvador del Tule partition decree *in rem* as *res judicata* binding upon the world (including all parties to this cause) as to 127,000 mineral acres, and as an estoppel by judgment binding upon the beneficiaries under Mrs. King's will as to the continuance of the mineral trust to 1930, as required by Section 1, Article 4 of the Federal Constitution, by Section 905 of the Revised Statutes (28 U.S.C.A. 687), by the decisions of this Court, and by the statutes and laws of the State of Texas?

2. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that Mrs. King in her will made no effective disposition of the beneficial interest and designated no uses, purposes and beneficiaries under the mineral trust, thereby ending the 50-year term of the mineral trust upon her death only six years later?

3. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that the mere

general power to lease or sell (without any reference to minerals as such or to mineral leases) gave the residuary trustees under Mrs. King's will the *special* power to develop and produce (or "waste") the minerals, none of which had been developed in her lifetime?

4. Did the Circuit Court of Appeals follow and apply the law of the State of Texas in holding that the mere *general* power to lease or sell gave the residuary trustees under Mrs. King's will the *special* power to lease or sell minerals upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust estate?

Reasons for the Allowance of the Writ.

These reasons clearly appear from the foregoing outline of the questions presented and from the following statement:

The "Full Faith and Credit" Clause.

Under Section 1, Article 4 of the Constitution of the United States, under Revised Statutes, Section 905 (28 U.S.C.A. 687), and under the decisions of this Court, the Federal Courts are required to give "full faith and credit" to the Tule partition decree *in rem* as *res judicata* binding upon the world as to title to 127,000 mineral acres and as an estoppel by judgment binding upon all parties to this cause against the termination of the mineral trust on Mrs. King's death. This is also the established law of Texas.

The decree of the District Court in this case, as affirmed by the Circuit Court of Appeals for the Fifth Circuit,

fails to give any "faith" or "credit" to the Tule partition decree *in rem*. On the contrary, it is squarely in conflict with the Tule partition decree. This Tule decree adjudicated the title to 127,000 mineral acres of the King Ranch in 1930 to be still in Robert J. Kleberg, Sr., *as mineral trustee* under the March 1, 1919 mineral trust; and he died in 1932 without disposing of that title and without a successor in trust being named. The decree as affirmed in the case at bar, on the contrary, adjudicated the title to these very same minerals as of 1925 in the residuary trustees and as of 1933 in the Humble Company under new leases made in that year.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is directly in conflict upon a question of Federal law with Section 1, Article 4 of the Federal Constitution, with Revised Statutes, Section 905 (28 U.S.C.A. 687), with the decisions of this Court, and with the applicable statutes and decisions of the State of Texas.

The Circuit Court of Appeals failed to follow the local law of the State of Texas.

The decree of the District Court, as affirmed by the Circuit Court of Appeals for the Fifth Circuit, in violation of the established law of the State of Texas, held that the residuary trustees under Mrs. King's will had power to develop or "waste" the minerals and to lease or sell them upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust in 1935.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case

is directly in conflict with the decisions of this Court holding that the Federal Court must follow the local law of the State of Texas in controversies relating to real property and other rights settled by the state law, in this case the State of Texas, in the foregoing particulars.

The questions here involved are extremely important. Leaving out of consideration the fact that vast property interests are here involved, it is of the utmost importance that this Court shall make certain that the Federal Courts have not over-ridden real property rights arising under a formal partition decree *in rem* in one of the state courts in Texas.

Moreover the holding (1) that Mrs. King's will failed to dispose of the beneficial interest and designated no uses, purposes and beneficiaries under her mineral trust; and (2) the holding that the mere general power to lease or sell the residuary trust estate (without any reference to minerals as such as to mineral leases) gave the residuary trustees the right (a) to conduct mining operations which would "waste" the minerals, and (b) to lease or sell minerals upon royalties, rentals or installments payable for 18½ years and on in perpetuity beyond the termination of the residuary trust, are each alike plainly in contravention of the established law of the State of Texas, as well as of the weight of authority elsewhere.

Under the relevant decisions of this Court hereinafter cited, such flagrant disregard of the state law provides ample reason for the allowance of the Writ sought in this case.

Wherefore, Petitioners pray that a Writ of Certiorari be issued under the Seal of this Court, directed to the

United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; that said final decree of said District Court as affirmed by said Circuit Court of Appeals for the Fifth Circuit be reversed or altered by this Honorable Court; and petitioners also pray for such other, further or different relief as may seem proper.

And these petitioners will ever pray, etc.

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, Distracted, *Petitioners,*

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